

## **THE STATE BAR OF CALIFORNIA**

### **Proposed Amended Rule 3-600 of the Rules of Professional Conduct of the State Bar of California**

(Amended by the Board of Governors January 26, 2002)  
(Subject to the approval of the Supreme Court)

#### **Rule 3-600. Organization as Client**

(A) In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

(B) If, in the course of representing a non-governmental organization, a member learns that an act or refusal to act of an actual or apparent agent of the organization (i) is or may be a violation of law reasonably imputable to the organization, or (ii) is likely to result in substantial injury to the organization, then the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

(C) If, in the course of representing a governmental organization, a member learns that an act or refusal to act of an actual or apparent agent of the organization (i) is or may be a violation of law reasonably imputable to the organization, (ii) is likely to result in substantial injury to the organization, (iii) constitutes the use of the organization's official authority or influence by the agent to commit a crime, fraud or other violation of law, (iv) involves the agent's willful misuse of public funds or willful breach of fiduciary duty, or (v) involves the agent's willful omission to perform his or her official duty, then the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; and

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

(D) Provided the member has taken action as described in subparagraphs (C)(1) and (2) without the matter being resolved, or, if the highest internal authority that can act on behalf of the organization is an agent whose conduct is described in paragraph (C), then the member would act consistently with his or her duty of protecting any confidential information as provided in Business and Professions Code section 6068, subdivision (e) by referring the matter to the law enforcement agency charged with responsibility over the matter or to any other governmental agency or official charged with overseeing or regulating the matter, if:

(1) the referral is warranted by the seriousness of the circumstances and not otherwise prohibited by law; and

(2) the agent's act or refusal to act constitutes the use of the organization's official authority or influence to commit a crime or fraud, or a willful misuse of public funds or a willful breach of fiduciary duty.

A member representing a governmental organization shall not be subject to discipline under these rules for making a referral under this paragraph if the member has acted in good faith to determine the propriety of making a referral and to identify the appropriate governmental agency or official as described in this paragraph.

(E) If, despite the member's actions in accordance with paragraph (B), (C) or (D), the organization insists upon action or a refusal to act that is described in paragraph (B), (C) or (D), then the member's response is limited to the member's right and, where appropriate, duty to resign in accordance with rule 3-700, or to act as otherwise authorized by law.

(F) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

(G) A member representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-310. If the organization's consent to the dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the

individual or constituent who is to be represented, or by the shareholder(s) or organization members.

## DISCUSSION

*Organization as an entity.* Rule 3-600 is not intended to enmesh members in the intricacies of the entity and aggregate theories of partnership.

*Multiple Representation.* Rule 3-600 is not intended to prohibit members from representing both an organization and other parties connected with it, as for instance (as simply one example) in establishing employee benefit packages for closely held corporations or professional partnerships.

*Institutional relationships and loyalties.* Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, and it is not the purpose of the rule to deny the existence or importance of such formal distinctions. In dealing with a close corporation or small association, members commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty. (See *People ex rel Deukmejian v. Brown* (1981) 29 Cal.3d 150 [172 Cal.Rptr. 478]; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) In resolving such multiple relationships, members must rely on case law.

*Members as employees and independent contractors.* Rule 3-600 applies equally to a member who provides legal services to the organization as an independent contractor as it does to a member who provides legal services to the organization as a full-time or part-time employee of the organization.

*Remediation under paragraphs (B) and (C).* Both paragraph (B) and (C) refer to “an act or refusal to act of an actual or apparent agent of the organization.” The language “act or refusal to act” is intended to include the concept of “remediation,” that is, an act or refusal to act by an agent of an organization may include past conduct. While reconsideration of the matter may no longer be possible, a member still may urge the agent acting on behalf of the organization to mitigate or remedy the effects of the past actions where such refusal amounts to further violations of law or additional prospective injury to the organizational client. Neither paragraph (B) or (C) is intended to authorize the member to disclose confidential information of past conduct outside of the organization.

*Permissive nature of rule 3-600.* Rule 3-600 is not intended to create a duty on the part of the member to take any action that is permitted under paragraphs (B), (C) or (D). (See rule 1-100(A).)

*Employment actions.* Rule 3-600 is not intended to limit a member's rights when bringing or defending an employment action. In particular, rule 3-600 is not intended to abrogate the law established by the California Supreme Court's decision in *General Dynamics v. Superior Court* (1994) 7 Cal.4th 1164 [32 Cal.Rptr.2d 1]. (See also *Santa Clara County Counsel Attorneys Ass'n v. Woodside* (1994) 7 Cal.4th 525 [28 Cal.Rptr.2d 617]; *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167 [164 Cal.Rptr. 839]; *Solin v. O'Melveny & Myers, LLP* (2001) 89 Cal.App.4th 451 [107 Cal.Rptr.2d 456]; *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294 [106 Cal.Rptr.2d 906].)

*Governmental organization as client.* Paragraph (A) does not identify with specificity who the client is when a member represents a governmental organization. Depending upon the circumstances, members may represent a variety of governmental organizations whose power and jurisdiction may originate from different enabling legal authority. Generally, a constituent body or official of the governmental organization will be part of such governmental organization and not an independent client of the member representing the parent governmental organization, even if the constituent body or official has authority to exercise exclusive power within the governmental organization over any particular subject or subjects. (See *Ward v. Superior Court (County of Los Angeles)* (1977) 70 Cal.App.3d 23 [138 Cal.Rptr. 532]; *Civil Service Commission v. Superior Court (County of San Diego)* (1984) 163 Cal.App.3d 70, [209 Cal.Rptr. 159].) On the other hand, when a member represents a state agency, the client generally will be the agency itself, but under certain circumstances, it may also be a branch of government, such as the executive branch, or the government as a whole. Rule 3-600 also contemplates that in some instances, the highest internal authority that can act on behalf of the governmental organization may be the government branch, department or official with constitutional or statutory oversight authority of the organization.

*Public nature of some governmental information.* Rule 3-600 is not intended to supersede the duty of a member who represents a governmental organization to publicly use or disclose information as may be required or allowed by law or by the administrative or business practices of the governmental organization the member represents. See, e.g., Government Code sections 6250-6277 (California Public Records Act); Government Code sections 54950-54962 (The Brown Act); Government Code sections 81000-91014 (The Political Reform Act of 1974); Government Code section 11120-11132 (the Bagley-Keene Open Meeting Act). Paragraph (C)'s requirement that a "member shall not violate his or her duty of protecting all confidential information as provided in Business & Professions Code section 6068, subdivision (e)" would not, for example, preclude a member representing a governmental organization from disclosing information where authorized by law, or from

providing the organization with legal advice in public where governing law otherwise permits such conduct.

*Response to misconduct by a governmental client.* Under rule 3-600, members representing governmental organizations have several options they may pursue when confronted with official misconduct. The particular remedial action they may take will depend on the kind of misconduct they encounter. Subparagraphs (C)(i) to (v) provide for a relatively broad range of misconduct that permits a member representing a governmental organization to pursue the corrective action set out in subparagraphs (C)(1) and (2). The types of misconduct that permit a member to avail himself or herself of the remedies provided in paragraph (D), however, fall within a narrower ambit. Under paragraph (D), a member may only report criminal or fraudulent misconduct, or a willful misuse of public funds or a willful breach of fiduciary duty to another governmental agency or official.

*Paragraph (D); referrals within government.* Paragraph (D) recognizes that the member has a duty to protect the confidential information of the organization. Nevertheless, paragraph (D) is not intended to limit a member to referring a matter only within the particular governmental organization that the member represents. As noted in paragraph 8 of this Discussion, the client generally will be the governmental organization itself. Rule 3-600, however, also recognizes that a member representing a governmental organization may represent any of a variety of governmental entities, including a political subdivision, branch, bureau, or instrumentality of a local, state, federal, or other government. The reference to "organization" in paragraph (A) includes any such governmental client. Because of this wide variety of governmental entities a member may represent, Rule 3-600 does not specify precisely how a member should report misconduct by a government employee when the member learns of conduct as described in paragraph (D). Paragraph (D) thus provides only that the government agency or official to whom the member may report could be the law enforcement agency charged with responsibility over the matter, or it could be any other governmental agency or official charged with overseeing or regulating the matter. In determining how to identify a governmental agency or official charged with overseeing or regulating the matter, the member should be guided by: (1) any statute, ordinance, or other law or regulation enacted by the entity, or by any entity of superior authority, that identifies the person, board, or agency to which such a referral should be made; (2) applicable case law; and (3) the principle that such referrals should be made within the government, and not publicly, in a way reasonably designed to avoid violating Business and Professions Code section 6068, subdivision (e). Depending upon the circumstances, the law enforcement agency charged with responsibility over the matter could be, for example, a city prosecutor, district attorney, attorney general or United States attorney.

*Exhaustion requirement and exception when reporting governmental client misconduct.* Subparagraphs (C)(1) and (2) set forth actions that the member must pursue as a prerequisite to availing himself or herself of the reporting options contained in paragraph (D). Paragraph (D) recognizes, however, that action under paragraph (C)(2) may be futile.

Consequently, if the action, refusal to act, or willful omission of duty involves the highest internal authority that can act on behalf of the organization, the member may take steps under Paragraph (D) without first pursuing the remedy provided in subparagraph (C)(2).

*“Safe Harbor” when reporting governmental client misconduct.* Paragraph (D) contemplates that, in the event the highest authority within the governmental entity is responsible for the action, refusal to act, or willful omission of duty, the member may believe that referral of the matter to the law enforcement agency charged with responsibility over the matter, or to any other agency or official with regulatory or oversight authority is necessary. Under those circumstances, the member should make the referral accordingly. However, if the member has difficulty in determining which law enforcement agency, or oversight agency or official, has responsibility, paragraph (D) provides a safe harbor for a member who acts in good faith both to determine the propriety of making a referral and to identify a proper agency or official to whom to make a referral in the face of such uncertainty.

*Option to withdraw from representation when a client organization is engaged in misconduct.* Paragraph (E) sets forth the limits on a member’s response after he or she has exhausted the actions permitted under paragraphs (B), (C) or (D). Generally, these limits also apply to a member who represents a governmental organization. For example, if the law enforcement agency and governmental agency or official with oversight authority over the matter as described in subparagraph (D) has determined that the agent of the governmental organization accused of misconduct has acted properly, then the member is limited to resigning in accordance with rule 3-700, even where the member believes that the law enforcement agency, oversight agency or official’s determination is erroneous. In some circumstances, however, a member representing a governmental organization may take action in accordance with applicable law. For example, a city charter may give the city attorney a right to act independently of the city council or other city officers in specified matters.

*Elected officials.* Paragraph (F) applies even if the employee is a publicly elected official or is appointed by an elected official.